UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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ESTHER KIOBEL,

Petitioner,

v. 16 Civ. 7992 (AKH)

CRAVATH, SWAINE & MOORE, LLP ,

Respondent.

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New York, N.Y.
December 20, 2016
11:20 a.m.

Before:

HON. ALVIN K. HELLERSTEIN,

District Judge

APPEARANCES

EARTHRIGHTS INTERNATIONAL
Attorneys for Petitioner
BY: MARCO SIMONS
and
COLUMBIA LAW SCHOOL HUMAN RIGHTS CLINIC
Attorneys for Petitioner
BY: BENJAMIN HOFFMAN

CRAVATH SWAINE & MOORE
Attorneys for Defendant
BY: LAUREN MOSKOWITZ

(Case called)

MR. SIMONS: Mark Simons, for petitioner Esther Kiobel.

THE COURT: Introduce your colleagues.

MR. SIMONS: I am here with Benjamin Hoffman and Alison Borochoff Porte.

THE COURT: You don't have to lean forward. Speak loudly as if there were no mic. It will pick it up.

Who are your colleagues.

MR. SIMONS: Benjamin Hoffman and Alison Borochoff Porte.

THE COURT: You may sit.

MS. MOSKOWITZ: Good morning, your Honor.

Lauren Moskowitz from Cravath Swaine & Moore, and with me is one of our associates who is not yet admitted Nicole Valenti.

THE COURT: You will be admitted.

Good morning.

MS. MOSKOWITZ: Good morning.

THE COURT: I will hear the petitioner, Ms. Kiobel.

MR. SIMONS: Where do you want me, your Honor?

Here or at the podium?

THE COURT: At the podium.

MR. SIMONS: OK.

THE COURT: Mr. Simons.

MR. SIMONS: Good morning.

THE COURT: Good morning.

MR. SIMONS: So, just to clarify a few things before going through the statutory and discretionary factors at issue in this Section 1782 application, we are not seeking discovery produced by the plaintiffs in the *Kiobel* or *Wiwa* cases or deposition transcripts of the plaintiffs or plaintiffs' witnesses. All we are seeking here is the defendant's discovery that was managed and produced through Cravath.

As we stated in our papers --

THE COURT: I don't understand the distinction you are making.

MR. SIMONS: In Cravath's papers they suggest that we are seeking things like Ms. Kiobel's own deposition transcript that we should have no need for because Ms. Kiobel should have her own deposition transcript.

So just to clarify --

THE COURT: What you want is discovery previously produced by Cravath?

MR. SIMONS: Yes.

THE COURT: On behalf of Shell.

MR. SIMONS: Yes.

THE COURT: Its client.

MR. SIMONS: On behalf of four Shell defendants.

THE COURT: In four civil actions.

MR. SIMONS: Yes.

THE COURT: Filed in the Southern District of New York.

MR. SIMONS: That's correct.

THE COURT: Pertaining to certain activities on the part of Shell.

MR. SIMONS: Yes, your Honor.

Alleged human rights abuses in Nigeria.

THE COURT: In Nigeria.

MR. SIMONS: To clarify one other thing, Cravath suggested none of this discovery ever should have been taken because the *Kiobel* case itself was ultimately dismissed by the Supreme Court.

We would disagree with that position, because this discovery was taken, as you suggested, in four cases, three of which were the *Wiwa* cases, one of which was the *Kiobel* case.

THE COURT: Let's assume it has the documents and doesn't want to produce them. Why should this Court order Cravath to produce the documents that it produced in four aborted actions?

MR. SIMONS: For several reasons, your Honor.

First of all, the statutory requirements for discovery are plainly satisfied. Cravath argues that the respondent is not present in this district because the real respondent is

Shell, not Cravath.

No case law supports that position. Two cases in this court have specifically rejected that position, including a previous case that Cravath participated in. So there's no support for the notion that the respondent is not present in the district simply because another party may also have an interest in the documents at issue.

The other statutory requirement that Cravath takes issue with is whether these documents are really for use in a foreign proceeding because they suggested that we have not submitted enough evidence that the foreign proceeding is within reasonable contemplation.

The case law on this suggests that we only need to show that it is more than merely speculative that the foreign litigation will be filed. Here we have an affidavit from Dutch counsel saying that they are preparing to file the case; that they have a draft of the writ of summons prepared, which is the initiating document in Dutch court; that they have sent what are known as liability letters to the intended defendants in this case; that they have obtained legal aid from the Dutch government in order to assist with this lawsuit, which requires them to demonstrate their progress in bringing a lawsuit, and in fact the same counsel is currently engaged in litigation against Shell over alleged environmental damage in Nigeria. So the notion that they are preparing to sue Shell over these alleged human rights abuses is far from speculative.

Cravath makes some suggestion that it's simply inappropriate to obtain documents from a law firm. There is, again, no support for that notion. The Second Circuit in the *Ratliff v. Davis Polk* case allowed a subpoena against a law firm for client documents, finding no support for the notion that simply because they were housed in a law firm they were exempt from discovery.

In the *Republic of Kazakhstan* case, which is also in the papers, discovery under Section 1782 was also granted against a law firm. So there should be no question here that the statutory prerequisites for Section 1782 discovery are satisfied.

That leads into the discretionary factors under the Supreme Court's decision in *Intel*. The first factor here, and the one that is the subject of some considerable debate, hinges on the foreign court's ability to order the discovery in question. This is not merely a mechanical exercise in identifying who the party is and who the respondent is. We recognize that the Second Circuit has suggested that where the target, where the respondent of the application is a law firm representing the foreign party in the foreperson litigation, that that foreign party's status may come into this particular factor.

But there are also a number of cases where courts have ordered discovery under Section 1782 even where the respondent is a party to the foreign action or has a similar level of possession or control of the documents at issue. So in the *Malev Hungarian Airlines* case, the Second Circuit ordered Section 1782 discovery against the party in the foreign litigation.

And in the *Minatec* case in the Northern District of New York, the court -- again, the application was directly against the party in the foreign litigation. There it wasn't clear whether the foreign court had the ability to order depositions of the U.S. employees whose depositions were sought in the application, and, again, the court allowed that discovery.

We would submit that that is somewhat similar, because while Shell is the intended defendant in the foreign litigation, that litigation, number one, has yet to be commenced, so there is no foreign court that actually has the ability to order these documents from Shell. And even if it were commenced, there is no guarantee that the foreign court would take it upon itself to order Shell to compel Cravath to hand over these documents.

There is no evidence that Shell actually retains these documents. In fact, in other Dutch litigation by the same counsel, Shell has said that it did not retain documents from a more recent period arising out of incidents in Nigeria.

Now, there's a couple of other cases that have addressed this factor in the context of the difficulty of obtaining documents in the foreign jurisdiction from a party. Again, that is not dissimilar from this case, where, as the declarations submitted by Dutch counsel have shown, obtaining documents in the Dutch courts is a cumbersome process because the documents need to be specifically identified and specifically related to the legal issues in the case.

That is not even available at this stage because the legal issues are not defined. But later on in the case, although these documents could potentially be obtained from the Dutch court, that would be a very cumbersome process.

There are a couple of cases: First, the *Auto-Guadeloupe* case in the Southern District, where, again, the court was dealing with discovery against a party and the court examined a foreign discovery system where documents needed to be identified with specificity on a document-by-document basis and concluded that it was not realistic to obtain the discovery from the foreign jurisdiction.

Again, in the *Infineon Technologies* case in the District of D.C., that case was technically about modifying a protective order, but it was modifying a protective order in order to allow the use of the discovery in foreign litigation, and so the Court looked to Section 1782 for guidance. Again, in that case, they examined this requirement that documents would need to be identified with specificity in the foreign jurisdiction. And that was a very cumbersome procedure.

THE COURT: You are saying that Section 1782 is used to enable discovery to be obtained here for use in a foreign tribunal even though it might not be easily available by direct order of that foreign tribunal.

MR. SIMONS: I think Section 1782 is all about efficiency, your Honor.

THE COURT: It's efficient to do it. It should be done. That is your essential argument.

Let's see what Cravath has to say.

MR. SIMONS: Right. Thank you, your Honor.

THE COURT: Ms. Moskowitz.

MS. MOSKOWITZ: Thank you, your Honor.

Lauren Moskowitz on behalf of Cravath, your Honor.

Before I dive into the factors and the requirements, I also would like to put this case in some context.

The underlying cases in which this discovery was produced were filed in 1996, and the *Kiobel* case in 2002. But there were four. The latest one was filed in 2004.

They all were the same, same facts, same alleged allegations, all arising be the Alien Tort Statute. Shell disputed jurisdiction in all of those cases all along.

One of those cases, however, went up on interlocutory appeal while the other cases proceeded in discovery, and *Kiobel* while on interlocutory appeal did proceed with discovery. The Supreme Court in 2013 said clearly that no jurisdiction ever lied for those cases under the Alien Tort Statute, which was the claims that the plaintiffs brought there.

So all of that discovery that was produced really never should have been taken in the first place. Today, 20 years after the events and over three years after the Supreme Court's decision, these lawyers, including Mr. Simons, who was actually counsel for *Wiwa* in the underlying litigation, and one new Dutch lawyer have come here asking for all of that discovery again for use in a possible lawsuit that may be filed in the Netherlands but has not yet been filed in the Netherlands.

Petitioner doesn't ask Shell for these documents.

THE COURT: They do not what?

MS. MOSKOWITZ: They did not ask Shell for these documents. They have asked Cravath. They have not brought any proceedings against Shell to try to obtain these documents. They've simply asked Cravath, presumably because we are in New York.

THE COURT: And you have the documents?

MS. MOSKOWITZ: I believe we do have some of the documents, your Honor.

THE COURT: Bundled up in Redwelds in a highly organized fashion.

MS. MOSKOWITZ: In a warehouse.

THE COURT: In a highly organized fashion that a sophisticated law firm uses. It's very easy to understand why they want to come after you. You have the documents, they're organized, they are handy, and they would like them.

MS. MOSKOWITZ: Yes.

THE COURT: 1782 provides a very liberal standard for getting them.

MS. MOSKOWITZ: Your Honor, it doesn't provide a liberal standard for getting them. It provides a whole set of requirements that petitioner must meet. The Supreme Court in the *Intel* case did set forth a series of factors because the -- recognizing that the court has wide discretion whether to grant or deny a petition even if the statutory requirements are met.

There is an overarching policy argument, your Honor, here that I think informs the whole analysis, and that is that this is a petition to a law firm. To allow a 1782 petition against a law firm for its client's documents where that client is the planned defendant in the foreign proceeding that the foreign Court will have jurisdiction over and can decide whether and to what extent to grant discovery against that defendant, to ask the law firm for those documents possibly could open the floodgates for 1782 petitions, especially in New York, where many global law firms reside.

Today many law firms represent international clients. The idea that if an international client sends its documents to a law firm that that could open up that client to U.S-style discovery through 1782 is going to provide a chilling effect on the ability of New York and U.S. lawyers to represent international companies.

THE COURT: That's hard to really believe. It is not a floodgate. We are not dealing with depositions, which is what most foreign people complain about. We are dealing with a cache of documents that presumably exists and could be easily produced.

MS. MOSKOWITZ: Your Honor, they exist. There are depositions --

THE COURT: We are not dealing with your work product.

MS. MOSKOWITZ: That's correct.

THE COURT: We are not dealing with your notes. We are not dealing with your legal analyses. We are dealing with stuff you got from a client that were produced in other cases. So it is not a floodgates issue.

MS. MOSKOWITZ: Your Honor, the Second Circuit in the very case that petitioner cited, the *Ratliff* case, did describe the dangers of this situation.

Now, the Court there did grant the discovery against Davis Polk because the client, after sending the documents to Davis Polk, voluntarily disclosed those documents to the SEC.

So there was a bit of a sword-and-shield concern there, but the Court did discuss a prior case that the *Ratliff* court summarized as holding that "exposing documents not otherwise subject to production to discovery demands after delivery to one's attorney whose office was located within the sweep of a subpoena would produce a curious and unacceptable result. The price of an attorney's advice would be disclosure of previously protected matters. That price would not only chill open and frank communications between attorneys and their clients, it would disenfranchise local counsel from representing foreign entities."

THE COURT: But we don't have that.

MS. MOSKOWITZ: I'm sorry, your Honor?

THE COURT: We don't have that.

This is not attorney-client privileged documents. These are documents that have already produced.

MS. MOSKOWITZ: That's right.

THE COURT: I think the language in *Ratliff v. Davis Polk* is instructive: "Documents held by an attorney in the United States on behalf of a foreign client, absent privilege, are as susceptible to subpoena as those stored in a warehouse within the district court's jurisdiction. Documents attain no special protection because they are housed in a law firm. Any other rule would permit a person to prevent disclosure of any of any of his papers by the simple expedient of keeping them in the possession of his attorney."

MS. MOSKOWITZ: Certainly, your Honor.

The point of that is to say that you can't shield documents that are otherwise discoverable by putting them in a law firm's possession. Of course that's black letter law. The black letter law is that the documents belong to the client, and merely the fact that you have sent them to a law firm does not expose them to discovery.

What the court was also saying earlier in that opinion is that if they weren't otherwise subject to discovery, and that much is true here, they are not otherwise subject to discovery, Shell is not here --

THE COURT: But the court meant something in the way of privilege. It was something about the documents that argued for that protection. There are no such arguments here.

MS. MOSKOWITZ: The only reason we have those documents, your Honor, is in the context of our representing Shell in multi-year litigation involving these same allegations, and we continue to represent Shell today to the extent of those issues continue to arise.

The fact of the matter is, though, the petitioner has not established that this is even for use in a foreign proceeding.

THE COURT: Let's take care of the first argument, the first argument, the argument of location, and the location is here, Cravath is here, so the person from whom discovery is sought resides in this district.

That prong is satisfied.

The second prong is whether these documents are being sought for use in a foreign proceeding. We are given three reasons, I think, why this is so.

A summons was issued.

Legal aid was obtained.

And there is a third reason. I can't remember. What is it?

MS. MOSKOWITZ: Your Honor, first, the summons was not yet issued. It's only been drafted according to petitioner's counsel's declaration.

The third reason --

THE COURT: What is a summons in the Netherlands?

Is it something like you have in the New York Supreme Court, or is it something more elaborate?

MS. MOSKOWITZ: Your Honor, I have no idea about the Dutch procedure on that. It's described as something that would be akin to an initiating document like a summons in New York court. That is the best of my understanding.

THE COURT: It is not much of a document to draft?

MS. MOSKOWITZ: I am not sure, your Honor. But I haven't seen it, and it has not been presented to the Court as evidence.

THE COURT: Do you know, Mr. Simons?

MR. SIMONS: Yes, your Honor.

I think there's some guidance on this in the Second Circuit's decision in *Mees*, where they talk about what the content of an initiating --

THE COURT: Just tell me what a summons is.

MR. SIMONS: It is the initiating document akin to a complaint, but it has a higher level of evidentiary requirement than U.S. procedure would require because the plaintiff is required to put forth essentially a prima facie case on the evidence.

THE COURT: So you are looking for the documents in order to draft the summons.

MR. SIMONS: That's correct, your Honor.

MS. MOSKOWITZ: With respect to the other fact that counsel points to, your Honor, which is the liability letters that they sent in 2013 to Shell, I don't understand how letters and threats three and a half years ago shows that a lawsuit is in reasonable contemplation.

THE COURT: What is the legal aid argument, Mr. Simons?

Sorry to interrupt you, Mr. Moskowitz.

Stand up, Mr. Simons.

MR. SIMONS: Sorry.

The legal aid argument, your Honor, is that the Dutch government has a legal aid program. In order to qualify for legal aid support, counsel for the plaintiff needs to demonstrate that they have made progress on their case. This is in, I believe, the reply declaration of our Dutch counsel.

THE COURT: I'll tell you what bothers me, Mr. Simons. I don't want these documents used for publicity purposes. If you are going to use them in drafting legal papers, that's one thing. But if are going to use them to malign Shell or anyone else in the press, that is something that I don't want to use the court facilities to help you do.

MR. SIMONS: Certainly, your Honor.

THE COURT: How can I be assured of that?

MR. SIMONS: I don't know if you want to keep going back and forth here. That is up to you.

THE COURT: I do. I am asking a question.

MR. SIMONS: Sure. I'm happy to address the confidentiality concerns at issue here.

THE COURT: Address them.

MR. SIMONS: The Dutch counsel has said they are perfectly willing to sign on to essentially the same confidentiality orders in the underlying litigation here.

THE COURT: Would that satisfy you, Ms. Moskowitz?

MS. MOSKOWITZ: No, your Honor.

The issue about the documents is that there are over 100,000 pages of documents and dozens of deposition transcripts. They were produced 15 years ago, 10 to 15 years ago. At this point I personally don't remember what is in there.

THE COURT: Let's suppose we get a solemn representation by anyone seeing these documents that they are not going to use them for publicity; they are going to be used only for drafting court papers and for use in proceedings after that.

MS. MOSKOWITZ: My understanding of the way the Dutch procedure works is that there is no way to insure the confidentiality of those documents when they are used in the Dutch proceeding. So it would be akin to publicly --

THE COURT: That is something different. They are used in the proceedings.

MR. SIMONS: We would respectfully disagree, your Honor. And I think --

THE COURT: About what?

MR. SIMONS: About whether the documents are in fact publicly available once submitted in Dutch court.

THE COURT: I don't care about that. I want a solemn representation by you, because you are going to get the documents, that you are not going to hand them over to anybody without getting a solemn representation from that other party that it promises to use the documents only for court proceedings.

MR. SIMONS: We are happy to make those representations, your Honor.

THE COURT: I want Ms. Moskowitz to have an opportunity to participate in the drafting of the representation.

MR. SIMONS: That is fine, your Honor.

THE COURT: I think that should help you a great deal, Ms. Moskowitz, and assure that they are going to be used in the proper proceeding.

MS. MOSKOWITZ: Your Honor, that would --

THE COURT: Thank you, Mr. Simons. You may sit.

MS. MOSKOWITZ: That would certainly help.

I think the other issue, though, is how overbroad the request is. They have had those documents. Mr. Simon has seen every single one of these documents. They were destroyed by the plaintiff here, the petitioner here in 2013, presumably even though they were contemplating suit.

THE COURT: Maybe it was a big mistake, but he wants yours. That is the issue.

MS. MOSKOWITZ: Yes, it is. But I am not sure why he needs every single page of them. He knows what he needs for the summons.

THE COURT: You know how burdensome it is to go through the whole thing to figure out what I might have and what I don't have. Maybe the records are not kept so clearly and neatly.

The question is, it is going to cost you more to start making distinctions between which document to give and which not. You are going to hold back the stuff you hold back in an American court. You are not going to give work product. You are not going to give attorney-client privilege.

As long as you are protected in doing that, you can give over the whole thing. That would be the cheapest and easiest to do. They're probably already numbered, Bates stamped, they're organized. You can control it. You know what you give. That is the easiest. That's the best.

MS. MOSKOWITZ: Your Honor, I think that would be perhaps in some ways less burdensome, but in some ways more burdensome. Because we don't know what is in there, we can't be sure that we are not running afoul of any other privileges or laws under the Netherlands law on --

THE COURT: It's stuff you already produced.

MS. MOSKOWITZ: Yes, a very long time ago, your Honor.

They were produced pursuant to a protective order that was entered by Judge Wood that petitioners never sought to modify, and those were presumed confidential.

THE COURT: Mr. Simons, can you use the same protective order?

MR. SIMONS: An analogous one, your Honor. Obviously it would need to allow use of the documents for a different litigation, but I think in substance, yes. The confidentiality order is fine as far as it goes.

THE COURT: Why don't I postpone this decision until you work something out that is suitable with Ms. Moskowitz, the order of protection that she legitimately needs?

All right. That is the prong for use.

MS. MOSKOWITZ: Yes, your Honor.

THE COURT: I find that you are here. I find that it's for use in the foreign proceeding.

MS. MOSKOWITZ: Your Honor, may I address the second requirement about the person resides within the district?

THE COURT: Yes, sure.

MS. MOSKOWITZ: Thank you.

THE COURT: I thought we already resolved it, though.

MS. MOSKOWITZ: The petitioner said that there is no case that has gone our way on this but that is not right. The *Bank of Cyprus* case in the Southern District in 2011 did go our way on this issue.

There were actually two 1782 petitions filed there. There was one in New York against the law firm, and there was one in New Jersey against the law firm's client, the actual owner of the documents.

The Court in New York denied the 1782 petition against the law firm so that the true parties in interest could litigate the discovery application over their own documents.

The Court specifically said that that made sense because of the law's recognition that documents in the possession of a party's attorney are in the party's possession, custody, or control.

THE COURT: They are under their control. Cravath has custody subject to the control of Shell. It is not a situation where Shell has been subpoenaed in one court and Cravath in a second court and proceedings would be duplicative. Shell has not been subpoenaed. Cravath has. I don't see the applicability of that case. There's a lot of other cases as well.

MS. MOSKOWITZ: I think it's applicable, your Honor, because they made the choice not to ask Shell for these documents. They have made an end run around the proper party who should have received the subpoena.

THE COURT: You have the.

Documents. I think we went through that.

MS. MOSKOWITZ: OK.

THE COURT: The *Davis Polk* case is right on point.

MS. MOSKOWITZ: So, moving to the *Intel* factors, your Honor.

THE COURT: Yes. We will go to that. Before we leave it, there is a very good decision by Judge Stein in *The Application of Schmitz*, 259 F.Supp.2d 294, (S.D.N.Y. 2003), a case involving the Cravath firm, where it argued that it is not the proper target of a petition because it merely was the custodian of a foreign client's documents.

Judge Stein held that the argument was creative but sails far wide of the mark. Application of Section 1782 does not involve an analysis of why a respondent has the documents. It's sufficient that respondents resided in this district, as they concededly do.

The Second Circuit denied the petition on discretionary grounds, but did not disturb that finding.

Let's go to the discretionary factors of *Intel*.

MS. MOSKOWITZ: Yes, your Honor.

I think *Schmitz* is a great place to go on that because, as your Honor just noted, the court, both Judge Stein and the Second Circuit, denied the 1782 petition based on those discretionary factors, and many of those overlap here.

Cravath was the target of a subpoena, but the court in looking at the first *Intel* factor said that for all intents and purposes the recipient of the subpoena really was the client. They were looking for the client's documents there. It was DT, Deutsche Telekom.

THE COURT: I am sure that Cravath will make every argument that Shell wants it to make, so I don't see that as much of a point.

MS. MOSKOWITZ: The reason it was relevant is that DT was a participant in the foreign proceeding and subject to the jurisdiction of a foreign court.

Your Honor, the twin aims of 1782, the whole guiding principle of 1782 is to ensure that foreign jurisdictions can get their evidence and to ensure reciprocity when U.S. courts need foreign evidence. Those aims are completely irrelevant if the foreign jurisdiction already has control and jurisdiction over the party that has and owns the documents.

The same way here, your Honor. If your Honor had a case where the defendant was right before you, you wouldn't need to get that defendant's documents by going to the Netherlands or any other country to get help.

THE COURT: There are four different entities for whom Cravath acted.

If each of those entities would become the respondent in a discovery proceeding. I think it would create a lot of complexity that is needless. You have the custodianship. You have the documents. It is an easy place to go. It is a logical place to subpoena.

I hold that there is very good reason to go after Cravath here.

The first factor is whether the person from whom the discovery is sought is a party in the foreign proceeding. It's not, although the proceedings may be aimed at one or another of Shell's companies. We don't know who it is and when it is and under what circumstances it is. It is not that that is a good factor here.

The second discretionary factor is the nature of the foreign tribunal, the character of the foreign proceedings, and the receptivity of the foreign tribunal to federal court assistance.

There is no indication the Netherlands court does not want the help of American discovery rules. The Netherlands is an advanced civilized society. It will give proper process to all the parties before it. Its judiciary is a vital and important and independent part of the government. I think it's the kind of proceeding that we would be very comfortable with. That factor goes towards requiring production.

And third is whether the request conceals an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country to the United States. There is no indication that any of that is happening.

The fourth is whether the request is unduly intrusive or burdensome.

It doesn't appear to be, because what one would expect the documents are neatly bound, numbered, and kept in the extraordinary capabilities of one of the major firms in the United States.

So I think everything goes for enforcing the subpoena.

MS. MOSKOWITZ: May I address two of those factors?

THE COURT: Yes.

MS. MOSKOWITZ: Thank you, your Honor.

With respect to the receptivity of the Dutch courts, your Honor, I would point your Honor to the government of the Netherlands amicus brief that was filed to the Supreme Court in this *Kiobel* appeal.

The court there said a few things of note with respect to U.S. courts and the ability of the government of the Netherlands to want to have control over its own rules and proceedings.

The court there said a few things. It said that U.S. courts operating within the Alien Tort Statute context "interferes with the rights of a nation to prescribe rules for and adjudicate disputes."

It also talked about the objecting to the efforts of U.S. litigators and judges to bypass legal systems of other sovereigns, and it also talked about the risks of improper interference with the rights of foreign sovereigns because the U.S. has chosen to adopt plaintiff-favoring rules and remedies that other nations do not accept.

One of the main rules that they were talking about there, which is what we quoted in our brief was the "generally broader discovery available to plaintiffs in the U.S."

So what the plaintiff is trying to do is take wholesale U.S-style discovery that was produced in a U.S. litigation and transport it all the way over to a Dutch proceeding that has its own rules and has told the United

States that it wants to use its own rules to adjudicate its disputes.

THE COURT: But in the final analysis these documents that are subpoenaed do not constitute evidence. They do not constitute evidence because they haven't been admitted and they may not be admissible in a Dutch court. They are asked for use in connection with the Dutch court, and only the plaintiff can figure out how to use this in a way that is consistent with Dutch rules of practice.

I don't see that as being a factor that is relevant here. I am not determining the substantive rules in the Netherlands or in Nigeria. That is for the Dutch court to decide. I am not determining whether it is appropriate for a Dutch court in the Netherlands to make rules of conduct that apply to a nation, a sovereign nation in Africa.

I am just simply saying that we have a cache of documents here that it's easy to get to and it's appropriate to subpoena them. That's as far as I am going.

MS. MOSKOWITZ: Would you like to hear on the last factor?

THE COURT: I love hearing from you, Ms. Moskowitz.

MS. MOSKOWITZ: Thank you.

THE COURT: You are a very good advocate.

MS. MOSKOWITZ: Thank you, your Honor.

With respect to the circumvention of foreign proof-gathering restrictions, petitioner recited --

THE COURT: Yes. I should say that, too, because we don't have a case where there's a need for much discovery against Ms. Kiobel. She is advancing an agenda of environmentalism. Whether it's applicable or not the Dutch court can decide and the Nigerian court may have to decide. It is not for me to decide. It doesn't play any part in what I have to do.

Mutuality is another issue. I don't think it's invoked in the kind of case we have here.

MS. MOSKOWITZ: That's right, your Honor.

In the *Kreke* case, Judge Buchwald did face a similar situation where a petitioner refused to engage with the German rules on gathering evidence precomplaint and came to the United States, to the Southern District to seek 1782 discovery against one of the entities that would have been a defendant in the German proceeding.

Judge Buchwald said that 1782 was not designed to encourage foreign litigants to come to the U.S. courts to preempt discovery rulings from a foreign tribunal that had clear jurisdictional authority, and that petitioner here is doing just that.

There is a procedure. It's Rule 843(a). They cited it to your Honor. They said it might be hard, but the two requirements Dutch counsel provides, and we've refrained and resisted the temptation to put in competing foreign law affidavits, listening to the Second Circuit and Supreme Court on that, but what she herself says is all she needs to do is be aware of the existence of the substance of the documents -- the petitioner clearly does, they have seen all these documents. They litigated this case for years -- and, two, must be able to show how those documents will allow her to discharge her burden of proof.

The idea that the legal issues are unclear here is a non sequitur. This is going to be an exact replica. Everyone has said that to your Honor. Dutch counsel and petitioner's counsel here have said we are going to do exactly what we did in the United States and bring it in the Netherlands. So the idea that they can't meet the 843 procedure, and they haven't even tried to, in the proper jurisdiction looks like an end run and forum shopping to avoid a possible negative result in the Netherlands.

THE COURT: Tell me what 843 means.

MS. MOSKOWITZ: Me, your Honor?

843 is the Dutch civil code of procedure provision that petitioner's counsel cited as allowing in certain circumstances for precomplaint discovery from the defendant.

The two requirements that the Netherlands counsel here, Dutch counsel cited was, first, that the petitioner must be aware of the existence and substance of the documents; and, second, they must be able to show how those documents, if they obtain them, would allow them to discharge the burden of proof.

I don't see how they can satisfy that, or at least make a good-faith effort to satisfy that given that they know exactly what these documents say. They had them in their possession. They destroyed them, but they did have them. They know what they say. And they know what legal theories they are going to bring this case under, especially if there is a draft writ of summons sitting on her desk, that she should be able to seek this discovery from the Dutch court from Shell under 843(a).

That is, of course, without prejudice to needing to renew in front of your Honor down the road, but it just seems like this is the wrong mechanism given that there is a mechanism in the Netherlands.

The Second Circuit in -- I am going to mess up the pronunciation but -- *Metallgesellschaft* did talk about the fact of foreign discoverability is a useful tool where the discovery would be equally available in the U.S. and foreign jurisdictions, which would render the 1782 request duplicative.

So we would urge your Honor to deny the petition here now so that the petitioner can proceed in the proper forum under 843(a) and attempt to get the discovery from Shell there.

THE COURT: Answer that, Mr. Simons.

MR. SIMONS: Certainly, your Honor.

So with respect to Section 843(a) of the Dutch civil code of civil procedure, we would respectfully disagree with Ms. Moskowitz on a couple of points.

First, even if it were possible to obtain these documents at this stage, it would be extremely cumbersome, because it does require a specific identification of each document and description of it in order to order a document by document production.

Second, I hate to disabuse Ms. Moskowitz of her confidence in my memory, but I do not recall every single confidential document that Shell produced over the course of this litigation. Even if I did, I could not tell or Dutch counsel what was in those documents because the confidentiality order prohibits me from could go so.

So it is not an answer to say that we can use the knowledge that we obtained under that confidentiality order to request those documents because that order specifically restricts that knowledge to use in the *Wiwa* and *Kiobel* cases in this court.

THE COURT: Hold it. It is part of the scope of Section 1782 to make a production and to enforce subpoenas in actions that have not yet been brought and that could be brought in the Netherlands.

It's not limiting to Section 1782 that there has to be the same technical bases to get discovery as exists in the foreign court. If it's for use in a foreign tribunal, the statute is satisfied, and there's nothing in the discretionary factors that causes me to limit production.

So I'm holding that, subject to working out an application of the old protective order to the new situation, proper representation of confidentiality from those using the documents, that they can be subpoenaed for use in the foreign proceeding.

That's my holding. Thank you very much.

MS. MOSKOWITZ: Thank you, your Honor.

THE COURT: How much time do you need, Ms. Moskowitz?

MS. MOSKOWITZ: It is a great question.

Perhaps when I work out the --

THE COURT: It's the end of the year, and you have other things to do. I don't know what the time pressures are on plaintiffs. Let's go off the record for a moment and discuss this.

(Discussion off the record)

THE COURT: The order is subject to working out the proper protective order and said representations by counsel using these documents. The same is to be submitted by the close of business on January 6, 2017.

Thank you very much.

MS. MOSKOWITZ: Thank you, your Honor.

(Adjourned)